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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-443

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TELEPHONE COMPANY.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HAROLD STERN,
Attorney for Petitioner,
70 Pine Street,
New York, N. Y.
WH 4-9177.

Of Counsel:
HAROLD STERN,
NORMAN ROTHFELD.

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Supreme Court of the United States

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No.....

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TELEPHONE COMPANY.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on April 10, 1973.

Opinions Below.

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-13a) is reported at 477 F. 2d 260. The findings of fact, conclusions of law and order of the National Labor Relations Board (App. B, *infra*, pp. 16a-37a) are reported at 197 N.L.R.B. No. 59.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 3, 1973 (App. A, *infra*, p. 14a). The Union's petition for a rehearing was denied on June 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (i).

Questions Presented.

1. Whether a Union official's speech at a Union membership meeting is protected by the First Amendment.

2. Whether the National Labor Relations Board may enjoin secondary boycotts on behalf of primary employers in order to effectuate public policy, or whether secondary boycotts are enjoinable only to protect neutral employers.

3. Whether Section 8(b)(4)(B) of the National Labor Relations Act requires workers to assist strikebreakers in the absence of a picket line.

4. Whether the N.L.R.B. may issue injunctions on behalf of persons not parties to nor involved in the dispute before it.

Statutes Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in App. C, *infra*, pages 38a-39a.

Statement.

A. The Board's findings of fact.

1. In New York City at construction jobsites, the New York Telephone Company (Telco) customarily subcontracts the performance of certain telephone cable installation work to electrical contractors whose employees are represented by Local Union No. 3, International Brotherhood of Electrical Workers AFL-CIO (Local 3). Telco craftsmen deliver the cable equipment to these jobsites,

where the contractors' employees, members of Local 3, unload the equipment and install it (App. B, *infra*, p. 18a).

2. The Telco craftsmen were on strike against Telco from July, 1971 until February, 1972. During this strike Telco management personnel delivered the telephone cable equipment to the jobsites. The Local 3 electricians in some instances refused to accept these deliveries from the Telco "strike-breakers" at six of the jobsites. Telco and Local 3 had meetings, the impact of which the Board did not appraise (App. B, *infra*, pp. 19a-22a).

3. The Board found—and relied exclusively upon this finding—that at Local 3's regular September 1971 mass membership meeting at Manhattan Center, in Manhattan, Business Manager Thomas Van Arsdale stated to the membership his view that it was contrary to trade union principles for union members to work with strikebreakers, but that each individual member would have to decide for himself what course of action to take (Local 3's 33,000 members include approximately 100 "telephone" workers). The Board accepted Van Arsdale's statements that he did not instruct Local 3 members not to install the material delivered by the "strikebreakers," that he did not threaten them with punitive action if they installed this material, that he sought only to clarify for the benefit of the members what action constituted strikebreaking under trade union principles, that he advised the members that each member must make his own personal decision, and that Local 3 "had no instructions *per se* regarding the matter" (App. B, *infra*, pp. 22a-23a, 28a).

4. The Board did not find that any Local 3 member ceased working, or failed to continue to perform his other work at his jobsite.

B. The Board's conclusions of law.

The Board, adopting the Trial Examiner's decision without further opinion, thereby concluded:

1. That regardless of his actual intent, Van Arsdale's statements to the Local 3 members at the membership meeting constituted an inducement violative of Section 8(b)(4)(i)(B) of the National Labor Relations Act (App. B, p. 28a).

2. That Van Arsdale's statements were not protected by the First Amendment because the object of the conduct was unlawful. The Board relied upon *IBEW vs. NLRB (Samuel Langer)*, 341 U. S. 694 (1951) (App. B, p. 28a).

3. That Van Arsdale's statement also violated Section 8(b)(4)(ii)(B) of the Act because the resulting interruption of business "also operated as a restraint upon secondary and neutral employers" (App. B, p. 30a).

4. With respect to Local 3's other legal defenses the Board stated, "Any contentions not expressly disposed of have been considered and rejected" (App. B, p. 31a).

5. Based upon this and other interferences of business relations between Telco and electrical contractors, the Board issued an order applicable to all employers everywhere (App. B, p. 32a).

The Decision of the Court of Appeals.

Inter alia, the Court of Appeals held:

1. The Business Manager Van Arsdale's speech was not protected by the First Amendment. Without commenting upon the merits of the union's contention that the First Amendment protects this statement, the Second Circuit grounded its holding exclusively upon a *dictum* in *IBEW vs. NLRB, supra*, 341 U. S. at 703-705, which case involved picketing exclusively (App. A, p. 8a).

2. The purpose of the prohibition against secondary boycotts—Section 8(b)(4)(B)—"In the absence of any authority to the contrary," is not limited to protecting neutral employers from entanglement in labor disputes not their own, but also to effectuate a public policy, and this prohibition therefore protects Telco, an employer involved in a primary labor dispute (App. A, p. 10a).

3. Under the Proviso to Section 8(b)(4) the right of workers to refuse to enter other employers' premises in order not to be required to break a lawful strike is limited to the right to "refuse to cross primary picket lines" at such premises (App. A, pp. 12a-13a).

4. The Board has discretion to issue its order against Local 3 not only with respect to Telco and the electrical contractors but also with respect to "any other employer or person" (App. A, p. 13a).

Reasons for Granting the Writ.

I.

The decision erodes substantial First Amendment rights.

For the first time since the Taft-Hartley law was enacted—perhaps for the first time in our history—a Federal appellate court has issued a decision equating picketing with speech. Since picketing in many situations is outside the protection of the First Amendment, the effect of this decision is to deprive non-coercive, non-inflammatory speech uttered in the context of a labor dispute of the protection of the First Amendment.

This decision explicitly was not grounded upon a consideration of the merits of the arguments, nor upon the intended scope of the First Amendment, but solely upon the *dictum* uttered by this Court in *IBEW v. NLRB*, 341 U. S. 694, that Section 8(c) of the Taft-Hartley Act

(the "free speech" subsection) does not extend its protection "to speech or picketing," and its implication that the First Amendment does not protect speech unconnected with picketing.

The Second Circuit stated:

> "Whatever merit these contentions might have in the abstract, they are disposed of by the Supreme Court's decision in *I.B.E.W. v. NLRB*, 341 U. S. at 703-705. • • •
>
> "It is thus clear that the court which rejected First Amendment objections to Section 8(b) (4) had 'speech' as well as 'picketing' inducements in mind."

This case was the first time that a Court of Appeals had before it the question of whether a union official's speech at a union membership meeting is protected by the First Amendment. The Second Circuit in effect held that such speech is outside the protection of the First Amendment in all situations that picketing is outside the protection of the First Amendment.

This overbroad decision not only renders uncertain the degree of protection afforded to speech uttered during labor disputes, but conflicts in principle with this Court's decisions which confer broad latitude upon speakers—other than union officials—who address mass meetings in meeting halls.

This Court has held, where a speaker hired a meeting hall and therein urged his audience that Jews should be killed, and advocated and incited violent altercations between his howling audience and his critics massed outside the hall, that the First Amendment protects him from a municipal imposition of a $100 fine. *Terminiello v. Chicago*, 337 U. S. 1, 69 S. Ct. 894, 93 L. Ed. 1131.

Why, then, should a union of 33,000 members suffer risk of contempt proceedings for all future time because Business Manager Thomas Van Arsdale's audience of some 3,000 at Manhattan Center included a few telephone workers, who heard his remark, in the course of a regular business meeting, that he opposed strike-breaking but that each member was free to make his own decision?

This Court now has before it the issue of the constitutionality of the Texas "secondary boycott" statute, which the Texas District Court invalidated as overbroad and inconsistent with the First Amendment on grounds not involved here. *Allee v. Medrano*, No. 72-1125, cert. granted May 7, 1973. The Texas District Court stated:

> "The constitution requires that limits on First Amendment activities be narrowly drawn and that they isolate the specific evils they are condemning for unless we are 'meticulous in that regard, great rights will be lost by the absence of findings, by the generality of findings, or by the vagueness of decrees.' *Plumbers Union v. Graham*, 345 U. S. 192, 204 (Douglas, J., dissenting), 347 F. Supp. 605 at 628."

The Fourth Circuit in *NLRB v. Longshoremen's Association (Maryland Ship Ceiling Co.)*, C. A. 4 (1964), 332 F. 2d 992, held, based in part upon the First Amendment, that a union's refusal as a matter of principle to refer its workers to work on a ship engaged in trade with Cuba did not constitute a secondary boycott, where the union did not call a strike or prevent the employer from obtaining other labor elsewhere or make any appeal to any other union not to work—all as in the instant case. While *Maryland Ship* has been distinguished on the ground that a political question was there involved, the Fourth Circuit did not ground its concern for the union's "right of expression" upon the political nature of the dispute.

This Court has consistently held that picketing during a variety of situations is outside the protection of the First Amendment precisely because picketing is "more than speech." This Court, speaking through Mr. Justice Marshall, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U. S. 308, 88 S. Ct., 1601 (1968) stated:

> "To be sure, this Court has noted that picketing involves elements of both speech and conduct, i. e., patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See, e. g., *Hughes v. Superior Court of State of California in and for Contra Costa County*, 339 U. S. 460, 70 S. Ct., 718, 94 L. Ed., 985 (1950); *International Brotherhood of Teamsters Local 695 v. Vogt, Inc.*, 354 U. S. 284, 77 S. Ct., 1166, 1 L. Ed., 2d 1347 (1957); * * *."

The distinction between speech and picketing therefore is *not*, as the Second Circuit here stated, "a distinction without a difference."

In summary, this case is simultaneously a case of first impression with respect to the impact of the First Amendment upon speech obstensibly prohibited by Section 8(b)(4) of the Taft-Hartley Act, and a departure from all the holdings of this court that picketing is "more than speech."

We respectfully urge that any failure to uphold the long-standing distinction between pure non-coercive speech and conduct such as picketing must have a deleterious effect upon First Amendment rights generally.

II.

The decision further confuses the scope of the prohibition of secondary boycotts.

This decision is the first explicit holding by any Federal Court that a secondary union's appeal in support of a lawful strike against a primary employer entitles the primary employer to the protection of Section 8(b)(4)(B). The Second Circuit in effect held that the prohibition of secondary boycotts was enacted to protect the public.

This Court, in two opinions by Mr. Justice Brennan, explicitly held to the contrary—that the purpose of the prohibition against secondary boycotts:

> "(1) Was *'limited* to protecting employers in the position of neutrals between contending parties' (*National Woodwork Mfrs. Ass'n v. NLRB* [1967], 386 U. S. 612 at 625)." (Italics ours.)

> "(2) 'was not concerned to protect primary employers against pressure by disinterested unions, but rather to protect disinterested employers against primary pressures by any union.' *Houston Installation Contractors Association v. NLRB* (1967), 386 U. S. 664 at 668."

See, *NLRB v. Local 825, Operating Engineers,* 400 U. S. 297, 302-303, opinion by Mr. Justice Marshall.

The Second Circuit's decision misstated Local 3's position as a contention "that charges must be initiated by the third-party employer." Petitioner does not take issue with the NLRB Rule that any person may perform the ministerial act of filing a charge and thereby initiating an NLRB proceeding. Where, however, all proceedings subsequent to the charge establish—as here—that no employer or other person contended that the union had entangled it in a dispute not its own, a Board order

cannot but have the sole effect of protecting the very primary employer which this Court has ruled was *not* the concern of Section 8(b)(4)(B).

The Second Circuit's decision in effect bypassed the numerous court decisions which have grappled with the issue—and have fashioned interpretations of Section 8(b)(4)(B)—with respect to when a primary dispute has sufficient secondary effects to render a union subject to injunction.

The Second Circuit's decision, therefore, conflicts in principle, if not also in fact, with the decisions of this Court in *National Woodwork and Houston Installation* as well as with the decisions of other circuits which delineate the parameters of Section 8(b)(4)(B.)

III.

The decision erodes the right of workers to refuse to assist strikebreakers.

The right of workers to refuse to work at premises other than their own in order not to be required to break a lawful strike was enacted as a proviso to Section 8(b) of the Taft-Hartley Act. This proviso reads:

> "Provided, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognized under the Act; * * *."

With respect to this proviso the Second Circuit in its decision stated:

> "To read 'refuse to enter' as 'refuse to work' or 'refuse to handle' would constitute a gross judicial

rewriting of the proviso, which is designed to protect workers who refuse to cross primary picket lines at the premises of another employer, a situation clearly not present here."

During the CWA strike against Telco picket lines were not feasible, because many of the numerous construction sites in Manhattan required a delivery of telephone cable equipment, and CWA could not know when such delivery would be made at any particular site.

Based upon the Second Circuit's footnoted assumption *arguendo* that the construction sites were also Telco situses, the Second Circuit's refusal to read "refusal to enter" as "refusal to work," fashions absurd results, which Congress patently did not intend. Had the electricians refused to enter these premises and perform *any* work at these sites after pickets appeared there, this proviso clearly would have legitimized such refusal. Because the electricians did enter the premises and did perform their work, refusing only to handle some deliveries from Telco management personnel or to work with them, thus virtually eliminating the secondary impact of their conduct, such refusal has here been found unprotected by this proviso. Furthermore, the presence of on-site pickets by the primary union undoubtedly would have caused much disruption of the work of secondary employers and employees, unrelated to CWA's primary strike against Telco.

This erosion of the coverage of this proviso by the Second Circuit conflicts in principle with decisions of the Fourth, Fifth, Sixth and District of Columbia Circuits, wherein, however, picket lines were present.*

**Teamsters Local 657 v. NLRB*, C.A.D.C. (1970), 429 F. 2d 204; *Kellogg Company v. NLRB*, C.A. 6 (1972), 457 F. 2d 519; *NLRB v. Greyhound Corporation*, C.A. 5 (1970), 368 F. 2d 778; *NLRB v. Union Carbide Corp.*, C.A. 4 (1971), 440 F. 2d 54, cert den. 404 U. S. 826; *NLRB v. Longshoremen's Association*, C.A. 4 (1964), 332 F. 2d 992.

In *NLRB v. Longshoremen's Association*, C. A. 4 (1964), 332 F. 2d 992, *supra*, no picket line was present. While the longeshoremen's refusal to work was "political," their boycott was not thereby rendered any less secondary in nature.

No Circuit supports the Second Circuit's decision herein. The Second Circuit cites *Grain Elevator, Flour & Feed Mill Workers, ILA, Local 418 v. NLRB*, 376 F. 2d 774 (D. C. Cir. 1967), as supporting its contention that on-site picketing is needed to legitimize a refusal to enter premises, but overlooked the fact that the union in *Grain Elevator* did not invoke the "refuse to enter" proviso but relied upon a *different* proviso, to wit:

> "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Clearly, therefore, the Second Circuit's misinterpretation of the "refuse to enter" proviso not only deprives workers of their fundamental right not to be required to help break a lawful strike, but also encourages unnecessary secondary disruption, by making picket lines and refusals to enter premises prerequisites for the invocation of the "refuse to enter" proviso, even where employees are willing to enter premises in order to perform most of their work and to minimize secondary disruption.

IV.

Injunctions should not have unlimited coverage.

The Second Circuit here upheld a Board order which seeks to protect every "person" in the world. Since the inception of our Anglo-American jurisprudence courts of equity have issued injunctions primarily to protect parties affected by the controversy before the court.

The Federal Rules of Civil Procedure provide that parties which do not themselves file a complaint in court may be represented only through class actions, through procedures which are circumscribed by Rule 23 FRCP. No class action ever has successfully been brought on behalf of every "person" in the world. Surely no party is entitled to make use of a government administrative agency as a means of bypassing Rule 23 restrictions.

In support of its enforcement of the Board order the Second Circuit cited two decisions by this Court—*International Association of Machinists v. NLRB*, 311 U. S. 72, 82 (1940), and *IBEW v. NLRB (Langer), supra*, 341 U. S. at 706. Neither decision sets a precedent for an injunction of this scope. Cf. *Communications Workers of America v. NLRB* (1960), 362 U. S. 479.

Not only does this order unsettle the scope of traditional equity jurisdiction, but this subjecting of a union of 33,000 members "to contempt proceedings for all future time" (*NLRB v. New Pines, Inc.*, C. A. 2 [1972], 468 F. 2d 427), surely is unjust.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

September 5, 1973.

Respectfully submitted,

HAROLD STERN,
Counsel for Petitioner.

Of Counsel:

HAROLD STERN,
NORMAN ROTHFELD.

APPENDIX A.

Court of Appeals Decision and Judgment.

U. S. COURT OF APPEALS,

SECOND CIRCUIT (NEW YORK).

National Labor Relations Board, Petitioner, and New York Telephone Company, Intervenor, v. Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, No. 72-1921, April 10, 1973

Petition to enforce an order of NLRB (197 NLRB No. 59, 80 LRRM 1630). Enforcement granted.

Edward N. Bomsey (Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Robert A. Giannasi, of counsel), for petitioner

Norman Rothfeld (Harold Stern, of counsel), New York, N. Y., for respondent.

Saul G. Kramer (Proskauer Rose Goetz & Mendelsohn, Edward Silver and Charles R. Held, of counsel; and G. Wallace Bates and William P. Whitman, New York Telephone Company, of counsel, New York, N. Y., for intervenor.

Before Smith, Feinberg, and Mansfield, Circuit Judges.

SMITH, Circuit Judge:

The National Labor Relations Board has petitioned for enforcement of an order against Local Union #3, International Brotherhood of Electrical Workers, (the "Union") to cease and desist from violations of the secondary boycott provisions of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(i) and (ii) (B). The Board's decision, adopting the findings, conclusions and order of the Trial Examiner, appears at 197 NLRB No. 59, 80 LRRM 1630 (1972). We find substantial evidence in the record to support the order, and enforce.

The underlying facts are not in dispute. New York Telephone Company ("Telco") has for many years subcontracted the jobs of installing telephone wire and cables and fastening certain iron work and terminals in buildings under construction or major alteration to independent contractors. Telco contracted with L. K. Comstock and Co. ("Comstock"), Lord Electric Co. ("Lord"), and J. Livingston and Co. ("Livingston") to do such work on a number of Manhattan jobsites. The employees of these contractors were represented by Local #3. Under the usual procedure, the material used by the contractor was delivered to the jobsite by Telco employees, who unloaded it from the trucks. The Local #3 members then would transfer the materials to the point of use, and install it.

In July of 1971, Telco employees, represented by the Communications Workers of America ("CWA"), went out on strike. Consequently, Telco management personnel were assigned the delivery jobs outlined above. At least during the period prior to August 31, 1971, these deliveries were accepted by the contractors' employees and installed, although there were apparently one or two instances in which Union members refused to accept or place the materials.

On August 31, a luncheon meeting took place between Thomas Van Arsdale, the Union business manager, Peter J. McCall, a Telco representative, Anthony Salerno, Comstock's telephone superintendent, and John Fenley, Lord's general superintendent.[1] The instances of non-acceptance of Telco deliveries were discussed. There was a conflict of testimony as to whether Van Arsdale stated that Union members had been instructed not to accept such deliveries, or whether he merely said that such actions were individual acts of conscience on the part of Local #3 members. The Trial Examiner found it unnecessary to rely upon what was said at the meeting, and did not resolve the dispute.

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[1]Fenley was also a vice-president of Local Union #3.

Telco then contracted with independent truckers to deliver the materials to the jobsites; several such deliveries were accepted. On about September 7, however, a telephone conversation took place between Fenley and McCall, McCall was told that Fenley and Salerno had met with Van Arsdale, who informed them that the new delivery arrangement might also lead to difficulties. Again, it was a matter of dispute—which the Trial Examiner did not find it necessary to resolve—whether Van Arsdale stated that Union members had been instructed to refuse deliveries, or whether he simply reported the possibility.

On September 9, Local #3 held its regular monthly membership meeting. In the course of his business report, Van Arsdale discussed the Telco situation, and told the membership that it was his view that when Telco management or independent truckers delivered materials to jobsites, they were acting as strikebreakers. He further stated that "if we were . . . to be true to the trade union principles, that there . . . would be no basis for men working under those circumstances." Van Arsdale emphasized, however, that this was his personal view and that others would have to make up their own minds. Van Arsdale had also made these views known in a number of individual discussions with Local #3 members.

On September 10, a meeting took place between McCall and Van Arsdale. McCall told Van Arsdale that Telco was taking a serious view of any refusals to accept deliveries, and might either bring court action or eliminate the subcontracting system entirely, leaving the installation work to be done by Telco employees. McCall testified that Van Arsdale "said he was sorry but they had taken a Trade Union stand that they could not be in a position of aiding or abetting strike breakers; that he considered such work, such material, deliveries to be strike breaking."

At about the same time, a number of interruptions began to occur on Manhattan projects. On September 9,

employees of Comstock on a job at 94th and Park Avenue, and employees of Lord at a job on Madison Avenue, refused to install wire and cable. On September 10, a Livingston foreman, a member of Local #3, refused to do a job at One Liberty Plaza involving deliveries by management personnel. On the same day, Livingston employees at 1409 Broadway refused to accept deliveries from "strikebreakers." On September 17, Livingston electricians at 919 Third Avenue refused to install material delivered by Telco personnel.

On September 21, Telco filed unfair labor practice charges against the Union. Pursuant to §10(1) of the Act, 29 U.S.C. §160(1), the Board's Regional Director sought a temporary restraining order against the Union's work interruptions. Such an order was issued by the District Court for the Southern District of New York on October 20, 1971. F. Supp. , 80 LRRM 2436.

On October 22, Comstock employees refused to install material at the 450 Park Avenue and 94th and Park Avenue jobsites. The District Court then granted a preliminary injunction on October 28, 1971. F. Supp. , 80 LRRM 2557. On December 29, 1971, the District Court found the Union in civil contempt and directed it to purge itself. 337 F. Supp. 31, 79 LRRM 2198 (S.D.N.Y. 1971).

I. *Inter alia*, §8(b)(4) of the National Labor Relations Act makes it an unfair labor practice for a union

"(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

The overriding purpose of these secondary boycott provisions is to protect "unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 N. S. 675, 692, 28 LRRM 2108 (1951). See also *NLRB v. Local 825, Operating Engineers*, 400 U. S. 297, 302-303, 76 LRRM 2129 (1971).

Here, it is clear that Local #3 members employed by neutral contractors refused to deliver or install materials delivered by other than striking Telco workers. The real question is one of fact—did the Union "induce or encourage" such refusals? And, it is a settled principle that this court should accept those findings of fact made by the Board which are supported by substantial evidence, even if we might have reached a different conclusion ourselves. See, e. g., *Bedding, Curtain and Drapery Workers Union, Local 140 v. NLRB*, 390 F. 2d 495, 499-500, 67 LRRM 2392 (2d Cir. 1967), cert. denied, 392 U. S. 905, 68 LRRM 2408 (1968).

The Union contends that Van Arsdale's statements at the September 9 meeting represented only his own personal views that Union members were explicitly told that they had to make up their own minds and that no "inducement or encouragement" under §8(b)(4) could therefore have taken place. But, we have been told by the Supreme Court that "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *International Brotherhood of Electrical Workers v. NLRB*, 341 U. S. 694, 701-702, 28 LRRM 2115 (1951). Or, in the more colorful words of Judge Goldsborough, "If a nod or a wink or a code was used in the place of the word 'strike,' there was just as much a strike called as if the word 'strike' had

been used." *United States v. United Mine Workers*, 77 F. Supp. 563, 566, 21 LRRM 2721, 22 LRRM 2005 (D.D.C. 1948), aff'd 177 F. 2d 29, 24 LRRM 2111 (D.C. Cir.), cert. denied, 338 U. S. 871, 25 LRRM 2038 (1949).

There was substantial evidence in the record from which the Board could conclude that Van Arsdale's remarks constituted the inducement or encouragement prohibited by §8(b)(4)(i)(B). Van Arsdale was the business manager of the Union, solely responsible for results in the field, who stated at an official meeting that his interpretation of trade union principles required the refusal to handle Telco deliveries. Soon following were a number of such refusals. While it may have been theoretically possible for a Union member to view Van Arsdale's statements as solely personal, and not the official position of the Union, the exercise is difficult at best. Indeed, Van Arsdale himself seems to have recognized this, for after stating that he had made his views known to individual members on several occasions, the following colloquy occurred:

"Q. Mr. Van Arsdale, focusing on the period between August 31st and October 19th—that's the period prior to the injunction, did you express your views to the members of Local 3 concerning whether they should or should not do the work?

Not the local's views, but yours? A. How do you distinguish between the local's views and my views?"

The Board was entitled to find that when Van Arsdale chose the official meeting to make his personal views known, he was "encouraging or inducing" action thereupon, even if the final choice were explicitly left up to Union members. This finding is corroborated by the fact that Union members who refused to handle Telco deliveries were not disciplined, despite the availability of sanctions in both the International Constitution and the Local Bylaws for those causing unauthorized work stoppages. See *NLRB v. Local Union #3, IBEW*, 467 F. 2d 1158, 1160, 81 LRRM 2483 (2d Cir. 1972); *Local*

Union #25, IBEW, 162 NLRB 703, 719-720, 64 LRRM 1203 (1967), enforced, 396 F. 2d 591, 68 LRRM 2633 (2d Cir. 1968; *Local Union #3, IBEW*, 140 NLRB 729, 740, 52 LRRM 1118 (1963), enforced, 325 F. 2d 561, 55 LRRM 2076 (2d Cir. 1963).

The facially equivocal nature of Van Arsdale's statements cannot in itself preclude the finding of a §8(b)(4)(i)(B) violation. In *NLRB v. Local 294, International Brotherhood of Teamsters*, 298 F. 2d 105, 106-107, 49 LRRM 2315 (2d Cir. 1961), we held that a union's requests for "cooperation" from firms and their employees dealing with a struck trucking concern amounted to a §8(b) violation. We noted that given the circumstances at hand, such a request was tantamount to encouragement of a secondary boycott. Surely the Board could have found the same here. Similarly, in *Truck Drivers and Helpers Local Union #728 v. NLRB*, 332 F. 2d 693, 56 LRRM 2395 (5th Cir.), cert. denied, 379 U. S. 913, 57 LRRM 2496 (1964), such statements by a union president as "I can't tell you anything. You do as you please. You don't have to handle no scab freight," and comments by stewards that they would not handle the disputed freight, but that others should make up their own minds were found to constitute §8(b) inducement. See also *NLRB v. District Council of Painters #48*, 340 F. 2d 107, 58 LRRM 2165 (9th Cir.), cert. denied, 381 U. S. 914, 59 LRRM 2240 (1965) (§8[b][4] violation premised on statements by union representative that struck manufacturers' materials were "unfair").

Nor does the Trial Examiner's finding that Van Arsdale had no actual intent to induce or encourage the work stoppages take the statements outside of §8(b)(4). It is enough that such inducement was the natural consequence of his statements; the Board's finding that work stoppages actually occurred as a result of the statements makes the proof of actual intent unnecessary. See *NLRB v. Local 459, IUE*, 228 F. 2d 553, 560, 37 LRRM 2219 (2d Cir. 1955), cert. denied, 351 U. S. 962, 38 LRRM 2211 (1956).

II. The Union argues that even if Van Arsdale's statements are assumed to be "inducement or encouragement," a number of factors precludes the finding of §8(b)(4) violations here. First the Union contends that the statements fall within the scope of §8(c) of the Act, 29 U.S.C. §158(c), which provides:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Alternatively, the Union argues that if §8(b)(4) does reach the statements made by Van Arsdale here, it is unconstitutional because of its prohibition against pure speech.

Whatever merit these contentions might have in the abstract, they are disposed of by the Supreme Court's decision in *IBEW v. NLRB, supra,* 341 U. S. at 703-705, 28 LRRM at 2119. There, the Court held §8(c) did not protect §8(b)(4) inducements or encouragements, reasoning that such a construction would gut the effectiveness of the secondary boycott provisions. The Court directly rejected the position, urged by the Union here, that only those inducements and encouragements that amount to a "threat of reprisal or force or promise of benefit" fall within §8(b)(4), holding instead that §8(b)(4) reaches every form of influence and persuasion. *Id.* at 701-702, 28 LRRM at 2117-2118.

The same case also disposes of any First Amendment objections to §8(b)(4), noting that "prohibition of inducement or encouragement of secondary pressure . . . carries no unconstitutional abridgement of free speech." *Id.* at 705, 28 LRRM at 2120. And, while the Union is correct in noting that the inducement in the Supreme Court case involved picketing and not the "pure speech" presented here, that is a distinction without a difference. The Court noted that:

"The remedial function of §8(c) is to protect non-coercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to *speech or picketing* in furtherance of unfair labor practices such as are defined in §8(b)(4)." (Italics added)

Id. at 704, 28 LRRM at 2820. It is thus clear that the Court which rejected First Amendment objections to §8(b)(4) had "speech" as well as "picketing" inducements in mind.

The Union next contends that, in view of the fact that the refusals to accept deliveries were few in absolute number and did not totally halt work on any project, no §8(b)(4)(i) or (ii)(B) "cessation of business object" was shown. The argument is without merit. The Supreme Court has made it clear that the subsection (B) "cease doing business" requirement may be satisfied by something less than a total halting of operations by the neutral employer. *NLRB v. Local 825, Operating Engineers, supra,* 400 U. S. at 304-305, 76 LRRM 2129. Bearing in mind that the issue of what was the object of any inducement or coercion is a factual question, see *Bedding, Curtain and Drapery Workers Local 140 v. NLRB, supra,* 390 F. 2d at 499-500, 67 LRRM 2392, we are unable to conclude that the Union's goal here was "so limited" or "the foreseeable consequences of its secondary pressure so slight," as to foreclose subsection (B) liability. *NLRB v. Local 825, supra,* 400 U. S. at 305, 76 LRRM 2129 See, e. g., *NLRB v. Local 830, International Brotherhood of Teamsters,* 281 F. 2d 319, 46 LRRM 2732 (3d Cir. 1960) (eight instances of refusals to handle out of thousands of sales sufficient to uphold board findings). Cf. *NLRB v. Local 801, Musicians,* 226 F. 2d 900, 904-905, 37 LRRM 2041 (2d Cir. 1955) (even unsuccessful attempts at inducement within purview of secondary boycott provisions.)

Similarly, the stoppages were neither so isolated nor *de minimis* in scope so as to give us ground to disturb

the Board's findings of a §8(b)(4)(ii) threat, coercion, or restraint. We have held in a case involving many of the same parties that a work stoppage alone (a number of which clearly occurred here) may constitute a §8(b)(4)(ii) threat. *NLRB v. Local #3, IBEW*, 325 F. 2d 561, 562, 55 LRRM 2076 (2d Cir. 1963). See also, *NLRB v. Highway Truckdrivers & Helpers, Local No. 197*, 300 F. 2d 317, 49 LRRM 2705 (3d Cir. 1962) (refusals to handle shipments found to constitute §8[b][4][ii] threats.)

Next, the Union argues that since the purpose of the secondary boycott provisions is to protect neutral employers from entanglement in labor disputes not their own, no §8(b)(4) violation can be found in this case where Telco, not the contractors, was the charging party. We disagree. While §8(b)(4) may be fairly characterized as a protection of neutral employers, Congress has nowhere indicated that charges must be initiated by the third party employer. Indeed, it is the neutral employer, subjected to secondary pressure by the offending union, who may most often be unwilling to go to the NLRB. As the Supreme Court has noted in another context, a "proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *NLRB v. Marine Workers*, 391 U. S. 418, 424, 68 LRRM 2257 (1968). Telco was neither a stranger to the conflict here, nor clearly without the "zone of interests" the National Labor Relations Act is designed to serve. *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150, 153 (1970). And, because enforcement of the Act depends "upon the initiative of individual persons," *Nash v. Florida Industrial Commission*, 389 U. S. 235, 238, 66 LRRM 2625, 2626 (1967), the Supreme Court has reminded us that "there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances." *NLRB v. Marine Workers, supra*, 391 U. S. at 424, 68 LRRM 2257. In the absence of any authority to the contrary, we think it would be against this policy of private initiative and free access

to impose a restrictive requirement of standing to complain in §8(b)(4) proceedings. Cf. *Bedding, Curtain and Drapery Workers, Local 140 v. NLRB, supra,* 390 F. 2d at 498, 67 LRRM 2392 (charging party was primary employer, not neutral employer).

III. In a final attempt to avoid the application of §8(b)(4), the Union seeks to invoke two exceptions to the statutory coverage: the "struck work" doctrine and the §8(b)(4) proviso. For the reasons outlined below, neither defense is applicable here.

The "struck work" doctrine recognizes as a primary dispute, and thus without §8(b)(4), the refusal of union members to do work, even at the site of a secondary employer, "which would otherwise be done by the striking employees of the primary employer." *NLRB v. Local 459, IUE, supra,* 228 F. 2d 559, 37 LRRM 2219. The Union argues that the Board had, previous to the work stoppages here, ordered Local #3 not to contest Telco's right to assign installation work to its own employees (Communications Workers of America) and that the Union was complying with the order. See 193 NLRB No. 116, 78 LRRM 1374 (1971) and 197 NLRB No. 137, 80 LRRM 1816 (1972). Thus, had it not been for the CWA strike, the Union argues, the installation work here would have been done by CWA members. Hence, the work is viewed as struck work, and §8(b) inapplicable.

This argument fails for several reasons. First, the NLRB orders about giving installation work to CWA employees are by their own terms limited to projects in Queens. 193 NLRB No. 116 n. 11, 78 LRRM at 1376 n. 11; 197 NLRB No. 137, 80 LRRM at 1816. There is simply no indication in either NLRB decision that the Manhattan installation work was to be given to CWA members, and thus it is impossible to view Local #3 employees as doing work that but for the strike, CWA workers would have done.

Secondly, even if we assume *arguendo* that the installation work here might someday be assigned to CWA

workers, the "struck work doctrine" remains inapplicable. It is clear from Judge Lumbard's opinion in *NLRB v. Local 459, supra,* that the doctrine allows union members to refuse to act as "strike-breakers," or put another way, refuses to treat as a secondary boycott the refusal to accept the "farmed-out work of a struck employer." 228 F. 2d at 558, 37 LRRM 2219. Here, the installation work done by Local #3 members was performed by them for many years before the CWA strike, continued to be performed by them during the strike, and for all the record indicates, appears to have been still performed by them after the end of the strike. This is hardly the situation the "struck-work" doctrine was aimed at—Local #3 members were clearly not being asked to act as strike-breakers in September and October of 1971.

The §8(b)(4) proviso reads:

"*Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the Act."

Thus, for the proviso to be applicable here, the Local #3 members must be considered as *refusing to enter Telco premises* when they engaged in the work stoppages.

Such a characterization of the Union actions is absurd. It stretches credulity to call the construction projects here Telco premises; indeed, a rational analysis would seem to show that the construction sites were precisely the premises "of his own employer" that are without the proviso.[2] But even if we accept *arguendo* the shaky

[2]Even if we were to view Telco and the contractors as temporarily sharing a common situs at the jobsites, the holding of *Grain-Elevator, Flour & Feed Mill Workers, ILA, Local 418 v. NLRB,* 376 F. 2d 774, 64 LRRM 2718 (D. C. Cir. 1967) would still make §8(b)(4) applicable in the absence of on-site picketing by the primary union (CWA).

"premises" premise, the Union cannot seriously contend that its members "refused to enter" the construction sites. The Union itself recognizes this when it argues that the refusals to handle Telco materials, which were clearly made by workers at the jobsites, did not result in any real cessation of work. Whatever the merits of that contention—which we rejected as an attempt to avoid the subsection (B) "cessation of business object" requirement above—it is obvious that the Union could not even begin to so argue had the Local #3 members refused to enter the construction sites. To read "refuse to enter" as "refuse to work" or "refuse to handle" would constitute a gross judicial rewriting of the proviso, which is designed to protect workers who refuse to cross primary picket lines at the premises of another employer, a situation clearly not present here. Cf. *Truck Drivers Union Local No. 413 v. NLRB*, 334 F. 2d 539, 543, 55 LRRM 2878 (D. C. Cir.), cert. denied, 379 U. S. 916, 57 LRRM 2496 (1964).

IV. Finally, the Union argues that the Board's order is overly broad, since it prohibits the Union from engaging in prohibited conduct not only with respect to Telco and the contractors involved here, but with respect to "any other employer or person." While the order is broad, it is well settled that the Board has wide discretion in fashioning remedies. See e. g., *International Association of Machinists v. NLRB*, 311 U. S. 72, 82, 7 LRRM 282 (1940). In view of the long history of secondary pressures brought by Local #3 against Telco, see *NLRB v. Local 3, supra*, 467 F. 2d 1158, 81 LRRM 2483; *NLRB v. Local #3*, 339 F. 2d 145, 58 LRRM 2003 (2d Cir. 1964); *NLRB v. Local #3, supra*, 325 F. 2d 561, 55 LRRM 2076, and the fact that the Union has already been found in contempt of court for continuation of its secondary activities here, a broad order was an appropriate exercise of the Board's discretion. *IBEW v. Langer, supra*, 341 U. S. at 706, 28 LRRM 2115.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

No. 72-1921

Before:

Smith, Feinberg and Mansfield, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents and representatives, on June 7, 1972. The Court heard argument of respective counsel on March 19, 1973, and has considered the briefs and transcript of record filed in this cause. On April 10, 1973, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be

enforced, and that the Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Respondent.

J. JOSEPH SMITH
Judge, United States Court of Appeals
for the Second Circuit

WILFRED FEINBERG
Judge, United States Court of Appeals
for the Second Circuit

Filed: May 3, 1973

A true copy,
A. DANIEL FUSARO
Clerk

APPENDIX B.

Decision of National Labor Relations Board.

TXD-137-72
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

LOCAL UNION No. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (J. LIVINGSTON & Co., *et al.*),

and

NEW YORK TELEPHONE COMPANY.

Case No. 2-CC-1208

Thomas T. Trunkes, Esq., for the General Counsel.
Proskauer, Rose, Goetz & Mendelsohn, by Saul G. Kramer, Esq., New York, N. Y., for Telco. Edward Silver and Charles R. Held of counsel.
Harold Stern, Esq., New York, N. Y., for Local 3. Norman Rothfeld, Esq. of counsel.

TRIAL EXAMINER'S DECISION

Statement of the Case

CHARLES W. SCHNEIDER, Trial Examiner:

This case was tried before me in New York, New York on November 1, November 3, and December 28,

1971, upon an unfair labor practice charge filed on September 21, 1971, by New York Telephone Company, Telco herein, against Local 3, International Brotherhood of Electrical Workers, AFL-CIO, Local 3 herein, and upon a complaint issued by the General Counsel of the National Labor Relations Board, on October 13, 1971. The complaint alleges in substance that Local 3 engaged in unfair labor practices in violation of Section 8(b)(4)(i)(ii)(B) of the National Relations Act (29 U.S.C. 128) by inducement and encouragement of employees of certain employers to stop work, and by threats to the employers, all in support of a strike by Telco's employees. The Respondent duly filed an answer denying the commission of unfair labor practices. Briefs were filed by the General Counsel on January 31, 1972, and by Local 3 on February 2, 1972. On February 1, 1972, Telco filed a Post-Hearing Memorandum in the nature of a brief.

Upon the entire record, including my observation of the witnesses, I make the following further:

Findings and Conclusions

I. Jurisdiction

New York Telephone Company (Telco), a New York corporation, with its office and principal place of business located at 140 West Street, Borough of Manhattan, City and State of New York, is engaged in providing telephone service in the State of New York. During the past fiscal year, Telephone derived in excess of $1,000,000 gross revenues from its operations, and during the same period it purchased material and goods in excess of $50,000 directly from firms located outside the State of New York.

Telco is, and has been at all times material herein, an employer engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(2), (6) and (7) and 8(b)(4) of the Act.

At all times material herein, L. K. Comstock and Co. (herein called Comstock), Lord Electric Co. (herein called Lord), and J. Livingston & Co. (herein called Livingston), have been engaged in business as electrical contractors in the construction industry, and at the times described below said electrical contractors, pursuant to agreements with Telco, were engaged in installing telephone cables and wires at jobsites located at Park Avenue and 94th Street, 488 Madison Avenue, One Liberty Place, 1409 Broadway, One Lincoln Plaza, 919 Third Avenue, 824 Third Avenue and 800 Second Avenue, all located in the Borough of Manhattan, City, County, and State of New York.

Comstock, Lord and Livingston are and have been at all times material herein persons engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (6) and (7) and 8(b)(4) of the Act.

Local 3 is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

In the Borough of Manhattan, New York City, Telco has for many years subcontracted to independent companies the placing of telephone wire and cable and fastening of certain iron work and terminals in buildings under construction or undergoing major alteration, when it appears that all the construction workers on a project are members of AFL-CIO Building Trades Council unions. The employees of these contractors are represented by Local 3. The contractors involved here are Livingston, Comstock, and Lord.

On these jobsites the necessary material and apparatus used by the contractors is ordinarily delivered and unloaded by Telco craftsmen (*i. e.*, employees). The contractors' employees, members of Local 3, then remove

the equipment from the point where it is unloaded by Telco, transfer it to the point of use, and subsequently install it.

The Telco craftsmen, represented by CWA, have been engaged in an economic strike against Telco since July 14, 1971. During this strike Telco has had various management personnel performing many of the essential tasks previously performed by the striking craft employees. Among these functions has been the delivery of materials and apparatus to building sites or buildings undergoing alterations.

From the beginning of the strike to on or about August 31, 1971, deliveries were made to the jobsite by management or non-striking personnel. For the most part these deliveries were accepted by the contractors' employees and the material was installed, though there apparently were one or two instances in which the contractors' employees refused to accept or place the materials. After August 31, virtually all deliveries made on behalf of Telco to these jobsites were refused acceptance by the contractors' employees or their supervisors, thereby substantially impeding or completely preventing performance by the contractors of their work for Telco. The reason ascribed for these refusals is that Telco's management personnel or other delivery men were performing the work of strike breakers, and that it is contrary to trade union principles for Local 3 members to "aid or abet" strike breakers. Work has not been impeded on all locations, however.

Local 3's principal defense is that the action of the employees of the contractors was individual action for which Local 3 is not responsible. Alternatively, Local 3 states other defenses detailed hereafter.

The Facts

The following individuals are involved in the events:

Thomas Van Arsdale, business manager for Local 3.

Peter J. McCall, supervisor of contract labor for Telco.

Anthony Salerno, telephone superintendent for Comstock.

John Fenley, general superintendent of Lord, and vice-president of Local 3.

J. Duffy, superintendent of Livingston.

Sol Werboff and Arthur Smith, general foremen of J. Livingston & Co., and members of Local 3.

The August 31, 1971 Meeting

On August 31, 1971, a luncheon meeting at a restaurant in Queens was arranged, apparently by Salerno and on his initiative, to which Salerno invited McCall and Van Arsdale. Fenley also attended. The apparent purpose of the meeting was to discuss the extent to which performance of Telco's contract work would be or was being affected by the CWA strike against Telco. Specifically the problem principally discussed was whether materials delivered to the contract jobs by Telco's management or non-striking personnel would be accepted and installed by the employees of Telco's contractors.

Of the four individuals present at the meeting all but Salerno testified—McCall as a witness for the General Counsel, Van Arsdale and Fenley as witnesses for Local 3.

There is disagreement in the testimony of McCall on the one hand, and that of Van Arsdale and Fenley on the other, as to important details of this meeting. McCall's testimony in substance is that Van Arsdale stated that he had been notified by his stewards that management personnel were making deliveries of telephone equipment to the jobsites, and that Van Arsdale further said that the stewards would be notified not to accept

such deliveries because to accept them would be aiding and abetting strike breakers.[1]

The testimony of Van Arsdale and Fenley as to this conversation, in substance, is that McCall asked Van Arsdale under what circumstances Local 3 members who were employees of the contractors would accept deliveries of material, that Van Arsdale responded that in his opinion Local 3 members would decline to accept deliveries made by management personnel, but would install any material which had been delivered to the job prior to the CWA strike, and would also accept deliveries of materials such as iron which prior to the strike had been customarily delivered to the jobsite by independent truckers. Van Arsdale and Fenley denied that Van Arsdale represented such positions or actions to be the position or action of Local 3 itself. I find the dispute unnecessary to resolve for reasons stated later.

Following this meeting Telco, apparently in an effort to avoid refusal of material delivered by its management

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[1]Thus, according to Superivsor McCall, in the August 31 meeting Business Manager Van Arsdale stated Local 3's position to be that,

> "Local 3 felt this [acceptance of deliveries from Telco personnel] was aiding and abetting strikebreakers, and that they would discontinue it. They would refuse to accept deliveries made by such people or by non-striking craft workers."
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> • • •
>
> "The Stewards would be notified not to accept these deliveries."
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> • • •
>
> "Mr. Van Arsdale said he was taking what he considered a Trade Union position in this, and he was sorry but that was as far as they could go with it." (Tr. 33)
>
> • • •
>
> "That he considered it strikebreaking, and that it could not continue." (Tr. 67)
>
> • • •
>
> "That he was going to stop it." (Tr. 68)

personnel, contracted with independent truckers to make deliveries of the material to the jobsites. Several such deliveries were made. However, on or about September 7, 1971, Telco Supervisor McCall received a telephone call from Lord's Superintendent Fenley. Fenley advised McCall that he (Fenley), Joe Duffy, superintendent of Livingston, and Comstock Superintendent Salerno had met with Van Arsdale, who had advised them that deliveries would not be accepted from the independent truckers because their employment by Telco was merely a subterfuge to circumvent the problem of delivery by management personnel. There is a dispute between McCall and Fenley as to the precise language of this conversation. According to McCall, Fenley quoted Van Arsdale as saying that he had instructed Local 3 members not to accept deliveries made by truckers.[2] Fenley's testimony, to the contrary, is that he told McCall that Van Arsdale had advised him (Fenley) that if outside truckers delivered the material Local 3 members would probably decline to accept it. For reasons given later I find it unnecessary to resolve this conflict in testimony.

On September 9, 1971, Local 3 held its regular monthly membership meeting, at which the Telco situation was discussed by Business Manager Van Arsdale. Van Arsdale stated to the membership his view that when management personnel or independent truckers delivered to jobsites material which Telco employees had delivered prior

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[2]Thus McCall's testimony is that Fenley told McCall that,

"• • • Mr. Van Arsdale had told the three people at that meeting whom I have identified that the use of independent Union trucking contractors to make telephone deliveries formerly made by CWA members was a subterfuge, and he went on to say that they were not to accept deliveries made by independent trucking companies." (Tr. 38)

• • •

"• • • that he considered it, if not strike breaking, aiding and abetting strike breaking." (Tr. 38-39)

to the CWA strike, they were acting as strike breakers and that it was contrary to trade union principles for Local 3 members to work with strikebreakers. However, Van Arsdale stated that each individual member would have to decide for himself what position to take in the matter. He also expressed similar views in individual discussions with members.[3]

In his testimony Mr. Van Arsdale candidly acknowledged his personal conviction that the handling of the controversial material by Local 3 members, or their working jointly with Telco employees performing such work, was in the nature of strike breaking and contrary to

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[3]Mr. Van Arsdale's testimony, in part, as to his statements at the membership meeting is as follows:

"• • • I explained to the members under what circumstances there would be strike breakers involved in the progress of a job." (Tr. 159)

• • •

"I explained to the members that if there were management people delivering material to the jobs which normally would have been delivered by men who are on strike, that under those circumstances those men, those management people would be acting as strike breakers and that if an outside trucking company were employed to make a delivery that normally would have been made by men who were on strike, that under those circumstances those men would be acting as strike breakers. And if the members of Local Union Number 3 undertook to do work that normally would have been done by strikers, that those members of Local Union Number 3 under those circumstances would be acting as strike breakers." (Tr. 159-160)

• • •

"I made some reference to trade union principles, yes." (Tr. 161)

• • •

"• • • something to the effect that if we were • • • to be true to the trade union principles, that there • • • would be no basis for men working under those circumstances. Something to that effect." (Tr. 161)

trade union principles and that a union man should not work under such circumstances.[4]

Those views Mr. Van Arsdale holds very strongly.[5]

Van Arsdale denied that he ever told or instructed Local 3 members not to handle or install the controversial material, or that he threatened them with any punitive action if they handled or installed the material. He further testified that in his discussions with members he sought only to clarify what constituted strike breaking, in order that each member might decide his course of action for himself.

On or about September 10, 1971, another meeting, apparently accidental, took place between Telco Supervisor McCall and Business Manager Van Arsdale. On this occasion McCall told Van Arsdale that the Company was taking a serious view of the situation and that unless the contract jobs could be completed Telco would have to consider taking other courses of action. Specifically McCall indicated that among the alternatives were court action, or elimination of the contract system on a permanent basis and having the contract work performed by Telco's employees. Van Arsdale's response in substance was that the refusal to accept deliveries was

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[4]Thus, he testified in part as follows:

"My personal view is that under no circumstances should a trade unionist ever accept the philosophy of working with a strike breaker." (Tr. 162)

This, he further testified, would include accepting deliveries made by management personnel during a strike and joint pulls with personnel performing work ordinarily done by strikers:

"• • • I do not believe that a trade unionist under any circumstance should work with a strike breaker.

"Now, if the strike breaker is at the end of a pool [pull], under those circumstances I think that the man should not work with that strike breaker. If it's a situation where a strike breaker is making a delivery, then I think that a trade unionist should not accept that delivery." (Tr. 164)

[5] "Q. You hold those views strongly, do you not? A. Very strongly. (Tr. 164)

a trade union stand based upon the conviction that the work was in the nature of strike breaking.[6]

The IBEW constitution and the by-laws of Local 3 prohibit individual strike action by union members and contain other provisions for discipline of offending members. No action has been taken by Local 3 to discipline any member for refusal to accept delivery of or install materials or to work with Telco management personnel in connection with this controversy. The record does not disclose that there is any contractual provision between Local 3 and any of the contractors against strikes or interruption of work.

On October 20, 1971, a temporary restraining order was issued by the United States District Court against Local 3 prohibiting unlawful interruption of work.

Interruptions of work

In the meantime a number of interruptions had occurred on Manhattan projects since the August 31 meeting of McCall, Van Arsdale, and the contractors' representatives. Thus, on September 9, 1971, employees of Comstock on a job at 94th and Park Avenue, and employees of Lord on a job on Madison Avenue, refused to install telephone wire and cable, presumably because their delivery involved "strike breaking" as defined by Business Manager Van Arsdale.

On September 10, 1971, Arthur Smith, a foreman for Livingston and a member of Local 3, advised Telco Supervisor McCall that he was unable to do a job at One Liberty Plaza on which cable had been delivered

---

[6]Thus, McCall's testimony is that at this meeting Van Arsdale

> "• • • said he was sorry but they had taken a Trade Union stand that they could not be in a position of aiding or abetting strike breakers; that he considered such work, such material, deliveries to be strike breaking." (Tr. 51)

by management personnel. On the same day employees of Livingston on a job at 1409 Broadway refused to accept delivery of Telco materials from "strikebreakers."

On September 17, 1971, Saul Werboff, a Livingston foreman and a member of Local 3, advised McCall that Livingston's electricians on a job at 919 Third Avenue had refused to install material because it was delivered by Telco personnel.

On October 22, 1972, employees of Comstock refused to install material at the 94th and Park Avenue job and on another job located at 450 Park, because they would not work with Telco management personnel on the job.

Contentions of the parties

The General Counsel and Telco contend the following, in substance: (1) That Local 3 induced and encouraged employees in violation of Section 8(b)(4)(i)(B) of the Act by Business Manager Van Arsdale's statements at the September membership meeting; (2) In accordance with the testimony of Telco Supervisor McCall, that Local 3 violated Section 8(b)(4)(ii)(B) by Business Manager Van Arsdale's asserted conduct in (a) telling McCall in substance in their two conversations and (b) in telling contractor superintendents Fenley, Duffy and Salerno that Local 3 would not handle or use material delivered to Telco jobsites by Telco personnel or independent truckers and; (3) That in any event Local 3 ratified and condoned the members' refusals to handle by failing to request or order the discontinuance of the action, by failing to disavow and repudiate it, and by failing to discipline members for engaging therein.

Counsel for the Respondent contends, in substance, that (1) the refusals to handle were not secondary action; (2) that Van Arsdale advised McCall and others, that the *members* of Local 3, and not Local 3 itself or Van Arsdale, would probably decline to handle the affected material; (3) that Van Arsdale's statements at the Sep-

tember union meeting were an expression of his concept of trade union principles, devoid of threats or promises, and thus (unlike picketing which involves more than speech) protected statements of view under Section 8(c) of the Act and the United States Constitution; (4) that Van Arsdale made no threats, either to members of Local 3 or to any employer; (5) since Local 3 made no demands on Telco to force a change in Telco's policies, and merely adhered to trade union principles, no violation of Section 8(b)(4) is involved; (6) that the material involved was "struck work"; (7) that if interruptions of work occurred they were sporadic and *de minimis* in comparison with the quantum of uninterrupted performances; and (8) that in any event the proviso to Section 8(b)(4) authorizes the refusal to handle the deliveries in this case since CWA was a representative of Telco's employees on strike.[7]

Conclusions

I conclude that the evidence establishes the violation of Section 8(b)(4)(i) and (ii)(B) alleged in the complaint. I am of the opinion that Business Manager Van Arsdale's statement to Local 3 members at the September meeting of the Local constituted inducement and encouragement by Local 3 of employees of Telco's contractors to refuse to handle or install the material in controversy. In the absence of persuasive proof to the contrary (of which I find none) the resulting refusals of Local 3 members to handle or install the involved material, whether viewed as individual or as concerted acts,

[7]The proviso reads as follows:

> *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act:

are to be deemed a consequence of Local 3's inducement and encouragement. To the extent that Business Manager Van Arsdale denied making the statements attributed to him by Telco Supervisor McCall, I do not find it necessary to decide whether the statements were made.

I accept Business Manager Van Arsdale's denial that he instructed Local 3 members not to handle or install the disputed material; I credit his assertion that he did not threaten them with punitive action if they handled or installed the material; I find credible his statement that in his discussions of the problem with Local 3 members, at the membership meeting or otherwise, he sought only to clarify for the benefit of the members what action in connection with handling the material would constitute strike breaking under trade union principles. And finally I accept his testimony that he advised the members that each must decide for himself what action to take, and that as he put it in his evidence, Local 3 had "no instructions *per se* regarding the matter." [Tr. 166]

Nevertheless, I find that, regardless of his actual intent, Van Arsdale's statements to the Local 3 members at the membership meeting must be interpreted as inducement and encouragement of them by Local 3 to decline to handle or install the material in controversy. Threats or force are not required to establish a violation of Section 8(b)(4)(i)(B) of the Act. It is enough that the union's conduct induces, encourages or persuades. Since the object of the conduct is unlawful, it is not protected speech within the meaning of the proviso of the Act (Section 8[c]), or the United States Constitution.[8]

---

[8]As the United States Supreme Court said in *International Bro. of Electrical Workers v. N.L.R.B. (Samuel Langer)*, 341 U. S. 694 (1951):

> "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." (701-2)

See also *Local 349 IBEW (Dade Sound)*, 149 NLRB 430 at 438, enf'd 357 F. 2d 579 (C.A. 5, 1969).

In the context of the discussion at the membership meeting concerning the problem, and the circumstances under which Business Manager Van Arsdale's statements there were made, his utterances constituted more than an isolated declaration of individual view. They were an expression of an informed position on a question of basic trade union principle, delivered at an official meeting of trade unionists by one of their titular leaders, for the purpose of advising the constituency that proper principle called for the invocation of a boycott by individual members of the union. In such a context the expression of Mr. Van Arsdale's strongly held views, personal though they were, are translatable only into an encouragement of the members to support those views by appropriate action. And they were so supported. I do not find it possible, in that setting, to appraise utterances from a union executive declared by the union's by-laws to be "solely responsible for results in the field,"[9]

(footnote continued):

In the *Langer* case, *supra*, in finding free speech principles inapplicable, the Supreme Court said:

> "e. The remedial function of §8(c) is to protect non-coercive speech * * * in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in §8(b)(4). The general terms of §8(c) appropriately give way to the specific provisions of §8(b)(4). (704-705)
>
> "5. The prohibition of inducement or encouragement of secondary pressure by §8(b)(4)(A) carries no unconstitutional abridgement of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. * * * The substantive evil condemned by Congress in §8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise." (705)

It will be noted that the principle stated by the Court is applicable to either "speech *or* picketing." (704, emphasis supplied.)

[9]Article VI, section 1, By-Laws of Local 3.

as something severable from his official personality—a philosophical formulation of detached private view, flowing from the disembodied spirit of another and more remote Van Arsdale unrelated to the officer of Local 3 who was uttering the words.

Without doubt Mr. Van Arsdale has a constitutional right to the free expression of a personal view, as distinguished from a view as the business manager of Local 3. When, however, in his role of business manager he chose the podium of Local 3 and one of its official meetings, and in the course of an official report on official matters, to espouse boycotting for the guidance of union members on a vital question of trade union philosophy affecting the performance of their jobs, those views cannot be construed other than as an authoritative union interpretation as to the course union members should follow. That interpretation I deem, in the words of the Supreme Court in the *Langer* case (341 U. S. 694, 702), to be a "form of influence and persuasion." That, as Mr. Van Arsdale told the members, Local 3 had "no instructions *per se* regarding the matter," is of no controlling relevance.

I therefore conclude that by the statements of Business Manager Van Arsdale at the September membership meeting Local 3 induced and encouraged employees of Telco's contractors to refuse to handle or install materials delivered to jobsites of the contractors by Telco personnel or independent truckers, or to work with such personnel, in situations in which such deliveries or work had previously been done by striking employees of Telco.

The inducement and encouragement having resulted in an interruption of business between Telco and its contractors, the conduct of Local 3 also operated as a restraint upon secondary and neutral employers. It therefore constituted a violation of Section 8(b)(4)(ii)(B) of the Act.[10] The violation of both parts (i) and (ii) of

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[10] *Local 370, United Association of Journeymen, etc. (Baughan Plumbing, Inc.)*, 157 NLRB 20; *Local Union No. 3, IBEW (Bisantz Electric Co., Inc.)*, 192 NLRB No. 63.

Section 8(b)(4) is thus established regardless of what Business Manager Van Arsdale told Telco Supervisor McCall, or told representatives of Telco's contractors, concerning the handling of the disputed material. It is therefore not necessary to decide that conflict in testimony. In this context the failure of Local 3 to request or order discontinuance of the work interruptions, or to disavow or repudiate them, or to discipline union members for the interruptions, is academic. Manifestly such forebearance by Local 3 is an expectable concomitant of the violation found.

To the extent necessary for decision the foregoing findings and conclusions dispose of all contentions of the parties, either expressly or implictly. Any contentions not expressly disposed of have been considered and rejected.

Remedy

The General Counsel and Telco request a broad order, based upon prior violations by Local 3 and reasonable expectancy that Local 3's unlawful conduct will recur. I find the requests in order.

In several prior cases involving somewhat similar situations, the Board has found that Local 3 interfered with busineses relations between Telco and contractors by conduct violative of the Act. See *Local 3, IBEW (New York Telephone Co.)*, 140 NLRB 729, enf'd. 325 F. 2d 561 (C. A. 2, 1963); *Local 3, IBEW (Western Electric Corp.)*, 141 NLRB 888; *Local 3, IBEW (New York Telephone Co.)*, 193 NLRB No. 111 (1971). It is seen that all of these decisions are within the past 8 years, and one very recent.

In these circumstances it would appear that further conduct of the same or similar nature may be anticipated and an order broad enough to cover such recurrence is appropriate. Such an order will therefore be recommended.

Conclusions of Law

1. New York Telephone Company, J. Livingston & Co., L. K. Comstock and Co., and Lord Electric Co., are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging its members employed by Comstock, Lord and Livingston to refuse to handle or install material delivered to jobsites by Telco personnel or persons other than striking personnel of Telco, or to refuse to work with such persons, where deliveries or work had formerly been done by the strikers, and coercing and restraining Comstock, Lord, and Livingston to cease handling such material, with an object of compelling Comstock, Lord and Livingston to cease doing business with Telco, Local 3 engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

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[11]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and its officers, agents and representatives shall:

1. Cease and desist from:

(a) (1) Inducing or encouraging individuals employed by J. Livingston & Co., L. K. Comstock and Co., Lord Electric Co., or by any other person engaged in commerce or in an industry affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, accept, transport, install, or otherwise handle or work on any goods, materials, or commodities, or to perform any services, or (2) threatening, coercing or restraining Comstock, Lord, Livingston or any other person engaged in commerce or in an industry affecting commerce, where in either case, an object of Local 3 is to force or require Comstock, Lord, Livingston, or any other employer or person to cease doing business with New York Telephone Company, or with any other employer or person.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in its business offices, meeting halls, and all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Local 3's representatives, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in con-

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[12]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spicuous places, including all places where notices to members are customarily displayed. Reasonable steps shall be taken by Local 3 to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notices to the Regional Director for posting by Livingston, Comstock, Lord and Telco, if they are willing, at locations where notices to their employees are customarily posted.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from receipt of this Decision, what steps Local 3 has taken to comply herewith.[13]

Dated at Washington, D. C.

CHARLES W. SCHNEIDER
Trial Examiner

NOTICE TO

EMPLOYEES AND MEMBERS

Posted by Order of the

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

To all members of Local No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and employees of J. Livingston & Co., L. K. Comstock Co., Lord Electric Co., and New York Telephone Co.

Pursuant to the recommended Order of a Trial Examiner of the National Labor Relations Board, and in order

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[13]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Local 3 has taken to comply herewith."

to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT induce or encourage individuals employed by Livingston, Comstock, Lord, or by any other person engaged in commerce or in an industry affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, accept, transport, install, or otherwise handle or work on any goods, materials, or commodities, or to perform any services, and

WE WILL NOT threaten, coerce or restrain Comstock, Lord, Livingston, or any other person engaged commerce or in an industry affecting commerce, where in either case, an object of Local 3 is to force or require Comstock, Lord, Livingston, or any other employer or person to cease doing business with New York Telephone Company, or with any other employer or person.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(J. LIVINGSTON & Co., *et al.*)

By _____

Dated_____

197 NLRB No. 59

D—6378
New York, N. Y.

UNITED STATES OF AMERICA,

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

LOCAL UNION No. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (J. LIVINGSTON & Co., *et al.*)

and

NEW YORK TELEPHONE COMPANY.

Case 2—CC—1208

DECISION AND ORDER

On March 2, 1972, Trial Examiner Charles W. Schneider issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondent, and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D. C.

NATIONAL LABOR RELATIONS BOARD

Edward B. Miller,
Chairman

Howard Jenkins, Jr.,
Member

Ralph E. Kennedy,
Member

(Seal)

APPENDIX C.

Relevant Excerpts of National Labor Relations Act.

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commence or in an industry affecting commerce, where in either case an object thereof is:

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

• • •

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any

person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act:

• • •

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

• • •

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-443

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

—and—

NEW YORK TELEPHONE COMPANY,

Respondents.

RESPONDENT NEW YORK TELEPHONE COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

EDWARD SILVER
Counsel for the New York Telephone Company
300 Park Avenue
New York, New York 10022

Of Counsel:

SAUL G. KRAMER
CHARLES R. HELD
PROSKAUER ROSE GOETZ & MENDELSOHN

GEORGE ASHLEY
WILLIAM P. WITMAN
NEW YORK TELEPHONE COMPANY

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IN THE

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OCTOBER TERM, 1973

No. 73-443

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

—and—

NEW YORK TELEPHONE COMPANY,

Respondents.

RESPONDENT NEW YORK TELEPHONE COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

On May 3, 1973, the Court of Appeals unanimously ordered enforcement of a Board order directing petitioner, Local 3 (a repeated law breaker) not to violate the secondary boycott provisions of the National Labor Relations Act, as amended. New York Telephone Company ("Telco"), the primary employer against whom the secondary boycott was directed, was the successful charging party before the Board and an intervenor before the Court of Appeals upon the Board's petition for enforcement.

Statement of the Case

For many years, Telco contracted with outside employers whose employees are represented by Local 3 for the placing of telephone cable, terminals and iron work in buildings in New York City that are under construction or undergoing major alterations when it appears that all the construction workers in a building are members of AFL-CIO building trade unions (P.A. 18a).* On those "contract labor" jobs, the necessary material and apparatus were ordinarily delivered and unloaded by Telco employees (P.A. 18a). The electrical contractor's employees, members of Local 3, brought them into the building to the point of use and placed the cable and terminals and affixed the iron work (P.A. 18a-19a).

In July of 1971, Telco's own employees, represented by Communications Workers of America, AFL-CIO ("CWA"), struck the Company.** During the strike, deliveries were made to the job sites by management personnel, delivery work that had previously been performed by striking Telco employees (P.A. 19a). This work had not been performed by Local 3 members prior to the strike and was not assigned to them during the strike.

From the beginning of the strike in mid-July until the end of August, 1971, deliveries made by Telco management

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* Citations to the Appendix submitted by the petitioner will be noted by a "P.A." followed by the appropriate page number(s). Citations to Telco's Appendix (*infra*) will be noted by "R.A." followed by the appropriate page number(s).

** The strike in no way affected the number or scope of jobs Telco awarded to Local 3 contractors. At no point during the strike were Local 3 electricians asked to do any task that would have previously been performed by a striking Telco employee—that is, to do struck work.

personnel were generally accepted and installed by Local 3 electricians (P.A. 19a).* In September and thereafter, on several occasions at various construction sites, Local 3 electricians working for outside contractors, (*i.e.*, neutrals), refused to accept and place the materials and cable; work they, rather than Telco employees, had regularly performed prior to the strike and during its early stages (P.A. 19a, 25a-26a).

These refusals were designed to support CWA. They were, as the Board and Court of Appeals have since found, induced and encouraged by Local 3, acting through its business manager, Thomas Van Arsdale, who is "solely responsible for [Local 3's] results in the field" (P.A. 5a-7a, 27a-29a).

More particularly, Van Arsdale admitted that, on September 9, 1971, at a regular membership meeting of the Local, in the course of his official report he:

> "• • • [E]xplained to the members under what circumstances there would be strike breakers involved in the progress of a job."
>
> • • •
>
> "I explained to the members that if there were management people delivering material to the jobs which normally would have been delivered by men who are on strike, that under those circumstances those men, those management people would be acting as strike

* As the Court of Appeals noted:

"At least during the period prior to August 31, 1971, these deliveries were accepted by the contractors' employees and installed, although there were apparently one or two instances in which union members refused to accept or place the materials." (P.A. 2a)

breakers and that if an outside trucking company were employed to make a delivery that normally would have been made by men who were on strike, that under those circumstances those men would be acting as strike breakers. And if the members of Local Union Number 3 undertook to do work that normally would have been done by strikers, that those members of Local Union Number 3 under those circumstances would be acting as strike breakers."

• • •

"I made some reference to trade union principles, yes."

• • •

"• • • something to the effect that if we were • • • to be true to the trade union principles that there • • • would be no basis for men working under those circumstances. Something to that effect." (P.A. 23a)

It was these remarks made in the course of an official report at a regular union meeting which, when viewed in context, led the Board and Court of Appeals to conclude that a plain inducement to boycott had been proved—an inducement that was in no way obscured by Van Arsdale's testimony that the union "had no instructions *per se* regarding the matter", or his wink, blink and nod observation "that each member of the union would have to decide for himself how he wanted to react • • •." (P.A. 28a, R.A. 21)

All this was reinforced by the fact that on September 10, 1971, Van Arsdale met with McCall, a Telco representative, and explained Local 3's position, stating "he was sorry but they had taken a Trade Union stand that they could not be in a position of aiding and abetting strike breakers; that

he considered such work, such material deliveries to be strike breaking." (P.A. 25a) Comments similar to those made by Van Arsdale to the membership on September 9 and to McCall on September 10 were made by him from time to time in the field to various members of Local 3 (R.A. 21).

Acting on a charge filed by Telco, and relying on the facts outlined above, the Trial Examiner and the Board concluded that Local 3 violated Section 8(b)(4)(i)(ii)(B) of the Act. Given the fact that Local 3 had repeatedly ignored the proscription of that Section, particularly in matters involving Telco, a broad cease and desist order was issued. The Court of Appeals enforced that order without dissent and denied Local 3's petition for reconsideration *en banc*.

The Petition

The petitioner now tells this Court that a writ of certiorari should be issued so that several questions may be determined. We submit that none of these issues is worthy of this Court's attention.

First, Local 3 argues that substantial first amendment rights have been eroded by the Board and Court of Appeals —that the secondary boycott which resulted from Van Arsdale's speech was subject to Constitutional protection because it was the product of speech rather than picketing. This contention is neither substantial nor novel, having been disposed of by this Court in the *Langer* case, *IBEW* v. *NLRB*, 341 U.S. 694, 704-705 (1951). See also, *e.g.*, *NLRB* v. *Local 74, United Brotherhood of Carpenters*, 181 F. 2d 126, 132 (6th Cir. 1950), *aff'd*, 341 U.S. 707 (1951); *NLRB* v. *United Brotherhood of Carpenters*, 184 F. 2d 60, 62 (10th Cir. 1950).

Second, petitioner maintains that its secondary boycott was not proscribed because it was directed at Telco which had a primary dispute with CWA. In essence, Local 3 argues that although it was a secondary union having no dispute of its own with Telco, it was somehow entitled to induce the employees of the neutral contractors to cease work simply because by so doing it was aiding and abetting CWA which was engaged in a primary dispute with Telco.

To avoid enmeshing neutrals in disputes not of their own making is the very purpose of Section 8(b)(4)(B) which is designed broadly to protect the rights of the public at large as well as those of the participating litigants. See, *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 302-303 (1971); *NLRB* v. *Marine Workers,* 391 U.S. 418, 424 (1968). The Court of Appeals correctly recognized that this principle was applicable here where the vindication of public rights was sought in the first instance by Telco. Its reasoning to this effect is persuasive and is supported by ample precedent. In these circumstances, review should be denied.

Third, Local 3 claims that its boycott is privileged under the "refusal to enter" proviso to Section 8(b)(4) which states:

> "Nothing contained in this sub-section (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

The places at which petitioner induced work stoppages were not Telco premises, were not manned by Telco employees, were not being picketed by CWA or anyone else and had for the most part already been entered upon by the electricians. They were, therefore, as the Court of Appeals held, outside the scope of the proviso which, in any event, does not permit a secondary union (Local 3) to engage in a secondary boycott. See, *ILA, Local 418 (Continental Grain)*, 155 NLRB 402 (1965), *enf'd*, 376 F. 2d 774 (D.C. Cir. 1967). None of the cases cited by petitioner on this issue deals with the fact pattern presented here and, despite petitioner's assertion, there is no conflict between Circuits (Pet. Br. at 11).

Finally, petitioner contests the broad order that was issued against it by the Board and approved by the Court of Appeals. The Board has authority to issue such an order under the Act. See, *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435-37 (1941). And, there was more than ample basis for such an order here where it was demonstrated time and again that Local 3 had no regard for the proscription embodied in §8(b)(4). See, *e.g., Local 3 IBEW (Diesel Construction and New York Telephone Co.)*, 205 NLRB No. 51 (Aug. 6, 1973); *Local 3, IBEW (New York Telephone Co.)*, 197 NLRB No. 137 (1972); *Local 3, IBEW (New York Telephone Co.)*, 193 NLRB No. 111 (1971), *enf'd*, 467 F. 2d 1158 (2d Cir. 1972); *Local 3, IBEW (Western Electric Co. and New York Telephone Co.)*, 141 NLRB 888, 144 NLRB 1318 (1963), *enf'd*, 339 F. 2d 145 (2d Cir. 1964); *Local 3, IBEW (New York Telephone Co.)*, 140 NLRB 729 (1963), *enf'd*, 325 F. 2d 561 (2d Cir. 1963).

ARGUMENT

The Petition Should in All Respects Be Denied

Section 8(b)(4)(B) of the Act was promulgated to protect the public from having innocent neutrals enmeshed in labor disputes not of their making. As this Court explained in *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297, 302-303 (1971):

> "Congressional concern over the involvement of third parties in labor disputes not their own, prompted Section 8(b)(4)(B). This concern was focused on 'secondary boycotts', which was conceived of as pressure brought to bear not 'upon the employer who alone is a party (to a dispute), but upon some third party who has no concern in it' with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands."

By inducing its members to refuse to perform services for neutral employers (the electrical contractors) with an object of forcing or requiring those neutrals to interrupt their business relationship with Telco, the primary disputant, Local 3 participated in a classic secondary boycott.

As we shall demonstrate below, none of the points raised in the petition is worthy of review by this Court. The Court of Appeals' determination, which is persuasively reasoned and exhaustive, should be allowed to stand, thus ending once and for all petitioner's studied disregard for the secondary boycott proscriptions of the Act.

POINT I

The First Amendment point is insubstantial.

Section 8(b)(4) prohibits labor organizations from "induc[ing] or encourag[ing]" employees to engage in secondary boycotts that unlawfully involve neutrals in labor disputes that are alien to them. Such inducements and encouragements may take many forms, but usually they are made through oral and written appeals.

For over 20 years it has been apparent that such unlawful written or oral appeals are not privileged under the Constitution or Section 8(c) of the Act simply because they are spoken or written, rather than caused by picketing.*

This conclusion was cogently stated in the *Langer* case, *IBEW* v. *NLRB*, 341 U.S. 694, 704-705 (1951):

> "The legislative history does not sustain a congressional purpose to outlaw secondary boycotts under §8(c).
>
> • • •
>
> "The remedial function of §8(c) is to protect noncoercive speech by employees and labor organizations alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection

* Section 8(c), which is known as the "free speech" provision of the Act, states:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

to *speech or picketing* in furtherance of unfair labor practices such as are defined in §8(b)(4). The general terms of §8(c) appropriately give way to the specific provisions of §8(b)(4).

"The prohibition of inducement or encouragement of secondary pressure by §8(b)(4)(A) [now §8(b)(4)(B)] carries no unconstitutional abridgement of free speech." (Emphasis added.)

See also, *e.g., NLRB* v. *Local 74, United Bhd. of Carpenters,* 181 F. 2d 126, 132 (6th Cir. 1950), *aff'd,* 341 U.S. 707 (1951); *NLRB* v. *United Bhd. of Carpenters,* 184 F. 2d 60, 62 (10th Cir. 1950); *NLRB* v. *Local 1, Distillery Wkrs.,* 178 F. 2d 584, 587 (2d Cir. 1949).

Given this state of the law, the Board, with judicial approval, has frequently concluded that oral and written appeals (other than picketing) violated Section 8(b)(4). See, *e.g., NLRB* v. *Construction and General Laborers' Union Local 270,* 398 F. 2d 86, 88-90 (9th Cir. 1968) (Advice from union official that "it would be best" if a union member left his job.); *NLRB* v. *Local 294, Teamsters,* 298 F. 2d 105, 106-107 (2d Cir. 1961) (Request for cooperation.); *NLRB* v. *District Council of Painters, No. 48,* 340 F. 2d 107, 110-111 (9th Cir. 1965), *cert. denied,* 381 U.S. 914 (1965) (Agent's statement that material was "unfair".); *Truck Drivers and Helpers Local Union No. 728* v. *NLRB,* 332 F. 2d 693, 696-697 (5th Cir. 1964), *cert. denied,* 379 U.S. 913 (1964); (Union president's response to member: "I can't tell you anything. You do as you please. You don't have to handle any scab freight.")

A contrary approach would emasculate Section 8(b)(4) for oral and written appeals would quickly replace picket-

ing and render otherwise unlawful secondary behavior beyond regulation. Plainly, this result was rejected by this Court in the *Langer* case, and no persuasive reason for its reconsideration has been suggested by petitioner.

Nothing in the *Tulse Hill* case, *NLRB* v. *International Longshoremen's Association*, 332 F. 2d 992 (4th Cir. 1964), even suggests a conflict between Circuits or otherwise warrants review. There, a union's political action wherein it induced its members not to work on a ship engaged in trade with Cuba was found to be privileged and, thus, not in violation of the secondary boycott proscription of the Act.

The Second, Eighth and District of Columbia Circuits have recognized that the *Tulse Hill* decision was limited to a general political question which was outside the scope of Board's jurisdiction. See, *NLRB* v. *Twin City Carpenters District Counsel*, 422 F. 2d 309, 312 (8th Cir. 1970); *National Maritime Union* v. *NLRB*, 346 F. 2d 411, 415-416 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 840 (1965); *National Maritime Union* v. *NLRB*, 342 F. 2d 538, 542 (2d Cir. 1965), *cert. denied*, 382 U.S. 835 (1965). As the Court of Appeals noted in *NLRB* v. *Twin City Carpenters District Counsel, supra*, at p. 12: *Tulse Hill* involved "a general political question, outside the purview of the Board's jurisdiction. The facts in *Tulse Hill* range far afield from the instant controversy. * * * These charges relate to no political dialogue but concern a controversy completely indigenous to union activity; one affecting its own members, members of other unions and employers of both." The same distinction applies here.

Finally, petitioner quotes out of context from *Allee* v. *Medrano** and urges that it somehow forms a basis for

* 347 F. Supp. 605 (S.D. Texas 1972), *cert. granted*, May 7, 1973 (No. 72-1125).

review (Pet. Br. at 7). Neither the overly broad Texas secondary boycott law which was struck down in that case nor the facts presented there have anything to do with the nature of the inducements involved here. Indeed, the rationale of the court in *Allee* was that the statute in question was by its terms unconstitutionally vague, something that is certainly not an issue here.

Equally without value here is Local 3's reliance on *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Petitioner argues that this case extends first amendment protection to the following situation: "[A] speaker hired a meeting hall and therein urged his audience that Jews should be killed, and advocated and incited altercations between his howling audience and his critics massed outside the hall * * *." (Pet. Br. at 6) This Court, however, explicitly stated that it would not have to reach that issue because the statute under which the petitioner was convicted was unconstitutionally broad.*

Plainly, the misstatements of law noted above do not form a basis upon which certiorari should be granted.

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* The Court noted:

"The argument here has been focused on the issue of whether the context of petitioner's speech was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees. We do not reach that question, for there is a preliminary question that is dispositive of the case.

* * *

"[The ordinance as construed by the trial court] permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." (337 U.S. at 3-5)

POINT II

Petitioner's statutory arguments do not warrant review.

Essentially, Local 3 asserts that its inducements to boycott were not unlawful because it was a secondary union, representing secondary employees whose refusals to work (which it induced) were designed to support CWA at the various locations in question, construction projects where Telco and the electrical contractors (the secondary employers) sometimes were present at the same time at a common situs. This argument is based on the "entry upon the premises" proviso of Section 8(b)(4)(B) and the notion that a secondary boycott which affects neutrals, the public and the primary employer is not proscribed unless the affected neutral employers complain to the Board and prosecute the case (Pet. Br. at 9-12).

Both points were convincingly disposed of by the Court of Appeals.

First, with respect to the absence of a neutral complainant, the Court of Appeals concluded:

> "While §8(b)(4) may be fairly characterized as a protection of neutral employers, Congress has nowhere indicated that charges must be initiated by the third party employer. Indeed, it is the neutral employer, subjected to secondary pressure by the offending union, who may most often be unwilling to go to the NLRB. As the Supreme Court has noted in another context, a 'proceeding by the Board is not to adjudicate private rights but to effectuate a public policy.' *NLRB* v. *Marine Workers*, 391 U.S. 418, 424 * * * (1968)." (P.A. 10a)

Plainly, there is a public policy against causing secondary boycotts by means proscribed by Section 8(b)(4)(i)(ii)(B) of the Act. And, this remains the policy of our nation regardless whether the primary employer, a neutral employer or an interested bystander files the charges and, together with the General Counsel of the Board, pursues the case to conclusion. The Court of Appeals recognized this to be so and its decision to that effect is in accord with existing precedent and so obviously correct as not to merit review by this Court.*

Second, the "entry upon the premises" proviso to Section 8(b)(4)(B) has nothing to do with this case. As the Court of Appeals noted:

> "• • • for the proviso to be applicable here, the Local #3 members must be considered as *refusing to enter Telco premises* when they engaged in the work stoppages.
>
> "Such a characterization of the Union actions is absurd." (P.A. at 12a; emphasis in original)

Commenting further, Judge Smith opined:

> "It stretches credulity to call the construction project here Telco premises; indeed, a rational analysis would seem to show that construction sites were precisely the premises 'of his own employees' that are without the proviso • • • [T]he Union cannot seriously contend that, the members 'refused to enter' the construction sites. • • • *To read 'refuse to enter' as 'refuse to work' or 'refuse to handle' would constitute a gross judicial*

* See, *Bedding, Curtain and Drapery Workers, Local 140* v. *NLRB*, 390 F. 2d 495, 498 (2nd Cir. 1968), *cert. denied*, 392 U.S. 905 (1968).

> *rewriting of the proviso, which is designed to protect workers who refuse to cross primary picket lines at the premises of another employer, a situation clearly not present here.*" (P.A. at 12a-13a; emphasis added.)

Disregarding this judicial expression and relying on cases where the primary union had established picket lines at the premises of the primary employer and employees represented by a secondary union refused to cross, Local 3 tells this Court that the decision below "conflicts in principle with decisions of the Fourth, Fifth, Sixth and District of Columbia Circuits • • •." (Pet. Br. at 11, fn.) No such conclusion can be drawn for those cases and petitioner's assertion represents a shocking misstatement of the law and the Second Circuit's position vis-a-vis the other Circuits.

Indeed, the decision below is squarely in accord with the Board and District of Columbia Circuit's decisions in *ILA, Local 418 (Continental Grain)*, 155 NLRB 402 (1965), *enf'd*, 376 F.2d 774 (1967).

There, SIU had a primary dispute with a shipper, Upper Lakes. Local 418, a secondary union, had a contract with Continental Grain, a secondary employer that operated grain elevators. Upon the arrival of a vessel operated by Upper Lakes at a Continental Grain elevator, Local 418 induced Continental employees not to load the Upper Lakes vessel.

Local 418 contended before the Board that its inducement of Continental employees to refuse to perform certain duties falling within the normal scope of their employment was lawful primary activity in support of the SIU strike. Rejecting this contention, the Board stated:

> "... [I]n a case such as this one, where the labor dispute is between a primary employer with an ambulatory situs and a union other than the one which seeks to induce secondary employees to take action because of that dispute, there must be some clear and contemporaneous notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer. Unless such notice is given, the dispute takes on the appearance and character of a dispute between the 'inducing' union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer." (155 NLRB at 411)

The Court of Appeals enforced, saying:

> "Prohibiting such appeals by secondary unions is not only consistent with the expressed terms of the Act, it also seems to us highly reasonable in terms of protecting the neutral employer from potential disruptions inherent in the situation." (376 F. 2d at 780)

See also, *e.g., Local 563, IBT (Inland Trucking)*, 186 NLRB No. 38 (1970); *Local 272, Painters (Howard H. Witney)*, 167 NLRB 511 (1967); *Carpenters Local 944 (Interstate Employers Association)*, 159 NLRB 563 (1966); *Local 441 (Suburban Development Co.)*, 158 NLRB 549 (1966); *Local 584, IBT (Fairway Farms)*, 141 NLRB 638 (1963).

POINT III

The scope of the cease and desist order is not a fit subject for review given Local 3's repeated disregard for Section 8(b)(4)(i)(ii) and its contemptuous behavior herein.

Despite its own contemptuous conduct herein,* Local 3 objects to the scope of the order, asserting that it is too broad. This contention does not establish a colorable basis for review.

In *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 436-437 (1941), this Court, passing on the scope of a Board order, stated:

> "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

See also, *International Association of Machinists* v. *NLRB*, 311 U.S. 72, 82 (1940).

Here, the Trial Examiner noted in his decision adopted by the Board:

> "In several prior cases involving somewhat similar situations, the Board has found that Local 3 interfered with

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* See, *McLeod* v. *Local 3, IBEW*, 337 F. Supp. 31 (S.D.N.Y. 1971); see also, *McLeod* v. *Local 3 IBEW* (not officially reported); 80 LRRM 2436 and 80 LRRM 2557 (S.D.N.Y. 1971).

business relations between Telco and contractors by conduct violative of the Act. See, *Local 3, IBEW, (New York Telephone Co.)*, 140 NLRB, *enf'd*, 325 F. 2d 561 (C.A. 2, 1963); *Local 3, IBEW (Western Electric Corp.)*, 141 NLRB 888; *Local 3, IBEW (New York Telephone Co.)*, 193 NLRB No. 111 (1971). It is seen that all of these decisions are within the past 8 years, and one very recent.

"In these circumstances it would appear that further conduct of the same or similar nature may be anticipated and an order broad enough to cover such recurrence is appropriate. Such an order will therefore be recommended." (P.A. at 31a)

And, the Court of Appeals concluded:

"In view of the long history of secondary pressure brought by Local #3 against Telco, * * * and the fact that the Union has already been found in contempt of court for continuation of its secondary activities here, a broad order was an appropriate exercise of the Board's discretion." (P.A. 13a)

Significantly, after the petition for enforcement was filed with the Court of Appeals herein, Local 3 conducted another secondary boycott in a dispute with Telco, once again asserting that it was not responsible for the so-called "individual action" of its members. The District Court issued a preliminary injunction, commenting: "Respondent's contention that concerted action was an individual assertion of liberty, rather than a job action or a secondary boycott, is foolish and fanciful, bearing no relation to reality." *Danielson* v. *Local 3, IBEW*, 82 LRRM 3114, 3117 (S.D.

N.Y. Feb. 26, 1973) (not officially reported). Subsequently, a Board cease and desist order was issued. *Local 3, IBEW (Diesel Construction and New York Telephone)*, 205 NLRB No. 51 (Aug. 6, 1973).

Finally it should be noted that petitioner's studied disregard of the Act's secondary boycott prohibition has not been limited to disputes involving Telco. See, *Local 3, IBEW (Hylan Electric Co.)*, 204 NLRB No. 38 (June 15, 1973); *Local 3, IBEW (Bisantz Electric Co., Inc.)*, 192 NLRB No. 63 (1971); *Local 3, IBEW (Atlas Reid, Inc.)*, 170 NLRB 584 (1968).

Given these circumstances, where Local 3 has repeatedly treated the secondary boycott proscriptions of the Act as a nullity, the Board's broad order is plainly appropriate. See, *IBEW* v. *NLRB*, 341 U.S. 694, 706 (1951); *NLRB* v. *Local 85, IBT*, 454 F.2d 875 (9th Cir. 1972); *NLRB* v. *General Drivers and Dairy Employees, Local 563*, —— F.2d ——, 76 LRRM 3002 (7th Cir. 1971), *cert. denied*, 404 U.S. 912 (1971).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

EDWARD SILVER
Counsel for the New York Telephone Company
300 Park Avenue
New York, New York 10022

Of Counsel:

SAUL G. KRAMER
CHARLES R. HELD
PROSKAUER ROSE GOETZ & MENDELSOHN

GEORGE ASHLEY
WILLIAM P. WITMAN
NEW YORK TELEPHONE COMPANY

APPENDIX

APPENDIX

Excerpts From the Official Transcript Made Before the National Labor Relations Board

(p. 143:)

Q. You have told us of three occasions when you have discussed the telephone company strike problems with members of your local. Will you tell us about some others? A. I don't recall any specific other circumstances.

Q. But there were other discussions, were there not? A. Well, it's logical to assume that there were other discussions because I am in the office every day and I am coming in contact with people and members of Local Union Number 3 every day, and you're talking about a period of some thirty or sixty, thirty or forty days, and it's very logical that there must have been discussion at the same time. It's very logical that I cannot recall specifically what they were and with whom.

* * *

(p. 144:)

Q. Mr. Van Arsdale, in your discussions with members of your local with respect to the telephone strike problem, did you express your views? A. The only recollections I have in regard to that are that I pretty much confined myself being aware of the technicalities of the law, I confined my remarks to a description of what would constitute strike breaking activities, and also I would have indicated in such discussions that each member of the union would have to decide for himself how he wanted to react to a situation. And that the local union had no instructions per se regarding the matter.

SUPREME COURT, U. S.

No. 73-443

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1973

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
WILLIAM GAUS,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 477 F. 2d 260. The Board's decision and order (Pet. App. 36a-37a, 16a-35a) are reported at 197 NLRB No. 59.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1973 (Pet. App. 14a-15a), and a petition for rehearing was denied on June 13, 1973 (Pet. 1). The petition for a writ of certiorari was filed on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union induced and encouraged its members employed by neutral employers to refuse to handle and install materials from a struck employer, and restrained and coerced neutral employers, in order to force them to cease doing business with the struck employer, in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B).

2. Whether the Board's cease and desist order was overly broad.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.* are set forth at Pet. App. 38a-39a.

STATEMENT

Petitioner Local 3 (the Union) represents employees of L. K. Comstock & Co., the Lord Electric Company, and J. Livingston & Co., three contractors of the New York Telephone Company ("Telco") (Pet. App. 18a; A. 63, 69).[1] These contractors install telephone wire, cable, and other materials in buildings, under construction or undergoing major alterations, in New York City (Pet. App. 18a; A. 60-61). Ordinarily, Telco employees deliver the necessary material to the jobsite and unload it; then, the employees of the contractor move the equipment to its installation point (Pet. App. 18a-19a; A. 61).

Employees of Telco who are represented by another union went on strike on July 14, 1971[2] (Pet. App. 19a;

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[1] "A." references are to the appendix in the court of appeals.

[2] All dates hereafter are in 1971.

A. 61-62). Thereafter Telco management personnel began making deliveries of installation materials (Pet. App. 19a; A. 61). These deliveries were accepted, with minor exceptions, until August 31 (Pet. App. 19a; A. 62). On that date, at a luncheon meeting called to discuss the effect of the strike on work of the contractors, Thomas Van Arsdale, business manager of the Union, informed a Telco supervisor, Peter J. McCall, that deliveries of supplies by Telco supervisors would likely be refused by employees of the contractors (Pet. App. 20a-21a; A. 62-63, 128-130). After the meeting, Telco had the deliveries of supplies made by independent truckers, and they were accepted (Pet. App. 22a; A. 63-64).

On September 9, the Union held its regular monthly membership meeting, at which the Telco strike was discussed (Pet. App. 22a; A. 140). Business Manager Van Arsdale later testified that he told the members "that if there were management people delivering material to jobs which normally would have been delivered by men who are on strike, * * * [or] if an outside trucking company were employed to make a delivery that normally would have been made by men who were on strike, that under those circumstances those men would be acting as strike breakers" (Pet. App. 22a-23a; A. 140). He added that, "if we were * * * to be true to the trade union principles, * * * there * * * would be no basis for men working under these circumstances" (Pet. App. 23a; A. 141). Finally, Van Arsdale stated that each individual member would have to decide for himself what position to take and that the Union had "no instructions *per se* regarding the matter" (Pet. App. 23a, 28a; A. 144-145).

On September 9, employees of the Comstock Company at one site, and employees of the Lord Company at another site, refused to install telephone wire and cable

because it had been delivered by substitutes for the striking Telco employees (Pet. App. 25a; A. 66-68). On September 10, a foreman for the Livingston Company, and a member of the Union, refused to install cable delivered by management personnel (Pet. App. 25a; A. 70-71). Later that day, the same foreman appeared at another site and refused delivery of Telco materials (Pet. App. 26a; A. 73). On September 17, there was another refusal to work by the members of the Union at a new site (Pet. App. 26a; A. 73).

The Union's constitution and bylaws prohibit individual strike action and prescribe disciplinary proceedings for members who violate the constitution or bylaws (Pet. App. 25a; A. 33-37). No action was taken against any employee refusing to install Telco equipment (Pet. App. 25a).

On September 21, Telco filed unfair labor practice charges against the Union with the National Labor Relations Board (Pet. App. 17a). The Board's Regional Director obtained from the district court a restraining order prohibiting further unlawful work stoppages, pending a final Board determination (Pet. App. 25a; 80 LRRM 2436 (S.D.N.Y.)). Thereafter, employees of the Comstock Company refused to install materials at two sites; the district court found the Union responsible for these refusals and held the Union in civil contempt of the restraining order (Pet. App. 26a; A. 107-115; 337 F. Supp. 31 (S.D.N.Y.)).

The Board, adopting its Trial Examiner's decision, found that, through Van Arsdale's September 9 speech, "Local 3 induced and encouraged employees of Telco's contractors to refuse to handle or install materials delivered to jobsites of the contractors * * *" in violation of Section 8(b)(4)(i)(B) of the Act, and that "[t]he

inducement and encouragement having resulted in an interruption of business between Telco and its contractors, the conduct of Local 3 also operated as a restraint upon secondary and neutral employees" (Pet. App. 30a). The Board entered an appropriate remedial order (Pet. App. 33a-35a). The court of appeals enforced the Board's order in full (Pet. App. 1a-15a).

ARGUMENT

1. Contrary to the Union's first contention (Pet. 5-8), Van Arsdale's statements to the Union membership on September 9, 1971, were not protected by the First Amendment. The Board found, and the court below agreed (Pet. App. 6a-7a), that Van Arsdale's statements constituted more than a mere expression of opinion; rather, they "must be interpreted as inducement and encouragement of [the members] by Local 3 to decline to handle or install the material in controversy" (Pet. App. 28a). As this Court ruled in *Electrical Workers* v. *National Labor Relations Board,* 341 U.S. 694, 705, "The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) [now Section 8 (b)(4)(B)], carries no unconstitutional abridgement of free speech."

2. The Union also contends (Pet. 9-10) that, since the purpose of Section 8(b)(4)(B) is to protect employers in the position of neutrals between contending parties, the Union cannot be found in violation of that section on the basis of charges filed solely by the primary employer, Telco. But the Act places no restrictions on who may file a charge (Section 10(b), 29 U.S.C. 160(b)), and "the person or group making the charges does not become the actor in the proceeding." *Amalgamated Workers* v. *Consolidated Edison Co.,* 309 U.S. 261, 265. Instead, "[t]he Board as a public agency

acting in the public interest" assumes sole responsibility for vindicating the policies of the Act (*ibid.*). Since Congress declared secondary activity violative of Section 8(b)(4)(B) to be contrary to public policy, the Board properly proscribed such activity, even though the neutral employers who were the immediate victims of the activity failed to complain.[3]

3. The Union further argues (Pet. 10-12) that its actions were protected by the proviso to Section 8(b) which permits a "refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike * * *." However, as the court below stated: "[F]or the proviso to be applicable here, the Local 3 members must be considered as *refusing to enter Telco premises* when they engaged in the work stoppages. Such a characterization of the Union actions is absurd. It stretches credulity to call the construction projects here Telco premises; indeed, a rational analysis would seem to show that the construction sites were precisely the premises 'of his own employer' that are without the proviso" (Pet. App. 12a).

4. Finally, contrary to the Union's contention (Pet. 12-13), the Board's order is not overly broad. Insofar as that order requires the Union to refrain from engaging in unlawful secondary activity not merely against the three subcontractors immediately involved, but also against "any other person engaged in commerce", its propriety is established by *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705-706, where the Court approved a similar type of order.

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[3] As the court below noted (Pet. App. 10a), "[I]t is the neutral employer, subjected to secondary pressure by the offending union, who may most often be unwilling to go to the NLRB."

Insofar as the order protects primary employers other than Telco,[4] it is justified by the Union's long history (Pet. App. 31a) of engaging in secondary activity violative of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
WILLIAM GAUS,
Attorney,
National Labor Relations Board.

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[4] The order prohibits secondary activity where an object is to force "Comstock, Lord, Livingston, or any other employer or person to cease doing business with New York Telephone Company, or with any other employer or person" (Pet. App. 33a).

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